

JERSEY / JUDGMENT

Cameron -v- AG [2013]

JCA 122A (21 June 2013)

[2013] JCA 122A

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Court of Appeal 21 June 2013 Before : Sir John Nutting, Bt., Q. C., President; C. Nugee, Q. C., and; R. Collas, Bailiff of Guernsey. James Cameron -v- The Attorney General Application for Costs Order. Advocate T. V. R. Hanson for Cameron. M. T. Jowitt, Esq., Crown Advocate.

JUDGMENT

THE president: 1. The Appellant has applied for an Order in the following terms "in respect of the representation by Hanson Renouf of the Appellant Cameron, 1/3 rd of the costs of the appeal shall be payable out of public funds, such cost to be ascertained by the Judicial Greffier (if not agreed) by allowing the full factor A component and apply an appropriate factor B uplift; for the avoidance of doubt, such order being without prejudice to the operation of Article 3 (3) of the Costs in Criminal Cases (Jersey) Law 1961 in respect of the other costs of the appeal." 2. The short background to the application is that the Royal Court convicted the Appellant on an indictment containing a total of 16 counts and sentenced him to 4 years six months imprisonment. The Appellant appealed to the Court of Appeal and pursued an appeal against conviction on counts 7, 12 and 13 only. The Court of Appeal allowed his appeal against the conviction on count 12 only. He did not pursue an appeal against sentence. 3. At the trial in the Royal Court, the Appellant appeared with three co-accused. All of them appealed to the Court of Appeal against convictions and, in some case, against sentence. Their appeals were all dismissed. The Appellant Cameron was the only Appellant to succeed in respect of any part of his appeal. 4. The charges they faces all arose out of fraudulent inducements to invest in properties in the United States. The Law relating to costs in criminal cases 5. Part 3 of the Court of Appeal (Jersey) Law 1961 dealing with appeals in criminal and quasi criminal matters contains no specific powers enabling the Court of Appeal to make orders for costs. Instead, article 3 of the Costs in Criminal Cases (Jersey) Law, 1961, as amended, confers on the Court of Appeal powers to award costs in criminal appeals. Section 3 provides as follows:- "3 Power of Superior Number of Royal Court or Court of Appeal to award costs

- (1) The Superior Number of the Royal Court or the Court of Appeal may, when it dismisses an appeal, or application for leave to appeal, under Part 3 of the Court of Appeal (Jersey) Law 1961, order the appellant to pay the whole or any part of the costs of the appeal or application, including the cost of any transcript of the shorthand notes of the proceedings at the trial made in accordance with a direction given by the Judicial Greffier under Article 42 of the said Law.
- (2) The Superior Number of the Royal Court, when it allows an appeal against a sentence, or the Court of Appeal, when it allows an appeal against a conviction or a sentence, may order the payment out of public funds of such sums as appear to the court reasonably sufficient to compensate the appellant for any expenses properly incurred in the prosecution of the appellant's appeal, including any proceedings preliminary or incidental thereto, or in carrying on the appellant's defence. The amount of costs that the court has ordered to be paid under this paragraph shall as soon as practicable be ascertained by the Judicial Greffier.
- (3) Whether or not the court makes an order under the provisions of this Article, there shall be defrayed out of public funds, up to an amount allowed by the court -
 - (a) where, by reason of the insufficiency of the appellant's means, an advocate has been assigned to the appellant, the fees and expenses of the advocate;
 - (b) the expenses of any witness attending on the order of the court, or examined in any proceedings incidental to an appeal in the court;
 - (c) the expenses of the appearance of the appellant on the hearing of the appellant's appeal or on any proceedings preliminary or incidental to the appeal;
 - (d) the expenses of an incidental to any examination of witnesses conducted by a person appointed by the court for the purpose, or of any reference of a question to a special commissioner appointed by the court; and
 - (e) the expenses of any person appointed as assessor to the court.
- (4) Except as provided in this Article, no costs shall be allowed on the hearing or determination of an appeal, or of any proceedings preliminary or incidental to an appeal, under Part 3 of the Court of Appeal (Jersey) Law 1961." 6. The only decision of the Court of Appeal in relation to costs in criminal appeals to which we were referred was the judgment in *Dowse and Heys v Attorney General* (Court of Appeal) September 26 th 1997, reported in note form at [1997] JLR N - 7. The decision was cited to us as authority for the proposition that the Court of Appeal may award costs even where an appellant has succeeded on part only of the appeal. In that case, the Appellant Dowse had been convicted on an indictment containing two counts, the first of being knowingly concerned in the unlawful importation of a dangerous drug, namely heroin, and the second of being in possession of a dangerous drug, namely heroin, with intent to supply. He was convicted by the Inferior Number of the Royal Court on both counts and sentenced by the Superior Number to a term of 13½ years' imprisonment, concurrent on each count. The Court of Appeal allowed the appeal against

conviction on the first count and dismissed the appeal against conviction on the second count. It also reduced the sentence to a term of imprisonment of 12 years. 7. The application for costs was not made at the conclusion of the successful appeal but was heard at a later date by a differently constituted Court of Appeal. At page 2, line 8 of the Court's judgment on the costs appeal, the President, the Rt. Hon The Lord Carlisle, Q. C., said:- "The appeal was allowed due to the failure of the prosecution to disclose to the defence evidence which was material to the issue which led to the convictions of the two appellants. At the end of his judgment, Mr Harman giving the judgment of the Court of Appeal, said at lines 35 to 40 on p.8 of the judgment of the Court of Appeal: "We are also satisfied that the consequent irregularity was the cause of a substantial miscarriage of justice. We have therefore concluded that the appeals must be allowed on counts one and two and the convictions on those counts quashed."" 8. The Court was satisfied that it had the power to make a costs order in favour of the Appellant Dowse and held, at page 3, line 43:- "The discretion to make such an order is absolute in relation to any count on which the appeal has been allowed. The principles which should guide the Court in the exercise of that discretion are, we are told, similar to the principles which apply in the English Courts and are clearly set out in the case of AG -v- Bouchard

(1989) JLR 350 , where it is said that "defence costs should normally be paid out of public funds unless there were strong reasons indicating otherwise."" 9. We respectfully agree that the natural meaning of Article 3(2) of the 1961 Law is to confer on this Court the power to order costs in favour of an appellant who has successfully appealed a conviction on at least one count on which he had been convicted by the Royal Court, notwithstanding that he unsuccessfully appealed against his conviction on one or more other counts. We also agree that the discretion to make a costs order is absolute. 10. In A-G v Bouchard

[1989] JLR 350 , the Royal Court (Crill, Deputy-Bailiff and Jurats Bailhache and Baker) held that it was right in Jersey to apply the same principles as in England and Wales, which has similar legislative powers governing the payment of defence costs out of public funds, where the accused is discharged from prosecution or acquitted. The Royal Court followed the guidance contained in Practice Direction : Number 5, 1981, and in particular paragraphs 3 and 4 thereof, whilst noting that the examples given in paragraph 4 thereof are not exhaustive:- "3. The exercise of those powers is in the unfettered discretion of the court in the light of the circumstances of each particular case. 4. It should be accepted as normal practice that an order should normally be made for the payment of the costs of an acquitted defendant out [of] central funds under section 3 of the 1973 Act unless there are positive reasons for making a different order. Examples of such reasons are:-

- (a) where the prosecution has acted spitefully or has instituted or continued proceedings without reasonable cause the defendant's costs should be paid by the prosecutor under section 4 of the 1973 Act;

- (b) where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is the defendant can be left to pay his own costs;
- (c) where there is ample evidence to support a conviction but the defendant is acquitted on a technicality which has no merit. Here again the defendant can be left to pay his own costs."
11. That Practice Direction has since been replaced in England by Practice Direction (Costs in Criminal Proceedings) [2011] 1 Cr. App. R. 13, Senior Courts which provides that the principle remains that a costs order should normally be made in favour of a defendant who has been acquitted on any count in the magistrate's court or the Crown Court unless there are positive reasons for not doing so. The relevant provisions of the Practice Direction are:-
- "2.2 In the Crown Court 2.2.1 Where a person is not tried for an offence for which he has been indicted, or in respect of which proceedings against him have been sent for trial or transferred for trial, or has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should normally be made whether or not an order for costs between the parties is made, unless there are positive reasons for not doing so. For example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was, the defendant can be left to pay his own costs. The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified. 2.2.2 Where a person is convicted of some count(s) in the indictment acquitted on other(s) the court may exercise its discretion to make a defendant's costs order but may order that only part of the costs incurred be paid. The court should make whatever order seems just having regard to the relative importance of the two charges and the conduct of the parties generally. Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, the amount must be specified in the order. [Paragraphs 2.2.3 and 2.3 are not relevant.] 2.4 In the Court of Appeal (Criminal Division) 2.4.1 A successful appellant under Pt 1 of the Criminal Appeal Act 1968 may be awarded a defendant's costs order. [The remainder of paragraphs 2.4.1 and paragraph 2.4.2 are not relevant.] 2.4.3 In considering whether to make such an order the court will have in mind the principles applied by the Crown Court in relation to acquitted defendants: see paras 2.2.1 and 2.2.2 above." Counsel's

Submissions

12. Advocate Hanson submitted that an Advocate of his firm was assigned a legal aid certificate pertaining to "A second opinion on the merits of the grounds of appeal and to present those meritorious grounds of appeal" that required his firm to carry out a great deal of work, much of it of a complex nature, in a relatively short period of time and in respect of an enormous amount of documentation. His firm provided a series of opinions and thereafter expended no further time on counts other than 7, 12 and 13 or upon sentence. Having succeeded on

one of those three counts, he asks for one third of his costs. 13. The application was opposed by Crown Advocate Jowitt on behalf of H. M. Attorney-General principally because of what he described as the narrow basis on which the conviction was quashed (the sufficiency of the complainant's evidence) and the amount of work that was involved in assessing the relevant evidence which, he submitted, was de minimis in comparison with the totality of the work involved in pursuing the other grounds of the Appellant's appeal. He also added that the result made no difference in fact to the Appellant's position as he remained convicted on a significant number of counts and his sentence stood as a result. 14. In reply, Advocate Hanson explained that he had to identify the plethora of routes to a conviction on Count 12 in order to make good the contention that the Appellant could not properly have been convicted and hence that the work involved was much greater than the Crown Advocate had suggested. He drew attention to the way the appeal was presented, the brevity and clarity of his submissions and his summary of the relevant evidence for which the Court has already expressed its gratitude. Discussion 15. The Appellant's appeal in relation to Count 12 was allowed on the basis that there had been insufficient evidence adduced by the prosecution. The complainant, Mr Keeling, was an elderly witness whose head went into a spin when he entered the witness box and although he recovered some memory during the course of cross-examination, he never gave any evidence on which the Appellant Cameron could have been found guilty. It was our decision that the Commissioner should have withdrawn the Count from the Jurats' consideration. 16. As the circumstances suggest that this was an elderly and nervous witness who was a key witness for the prosecution called to give evidence of a personal and distressing kind who had difficulty in recalling specific events when in the witness box, there are no positive reasons for not making a costs order in his favour. 17. The Crown Advocate's submission that costs should be disallowed because the result made no difference to the Appellant does not, in our view, amount to a positive reason for not making the order. His conviction on a significant number of other counts involving different investors provides no justification for maintaining a conviction which should not have been entered. For example, each of the convictions could found the basis of a claim for compensation by a defrauded investor. If an appellant had the means with which to pay compensation to the complainants, it would make a difference to his position if a wrongful conviction were not quashed. We understand that this Appellant, Cameron, does not have the means to compensate the victims of his crimes but that should not mean that he is to be treated differently; there cannot be one rule for wealthy fraudsters and another for those who are poor. 18. Crown Advocate Jowitt's other submission that the amount of work properly involved in the successful appeal is de minimis in relation to the total amount of work carried out by Advocate Hanson and his firm on behalf of the Appellant amounts, in our view, to an argument as to the quantum of costs to be recovered and does not go to the question whether to grant an order for costs. 19. At this point, it is necessary to mention the significance of an order for costs in respect of a legally aided appellant. Advocate Hanson summarised the position at paragraph 9 of his Skeleton Argument:- "9. In legally aided cases, save in exceptional cases, there is generally no financial assistance provided by the States of Jersey towards the time of Jersey lawyers who are obliged to act once in receipt of a legal aid

certificate that is allocated on a rota system amongst the legal profession. In criminal appeals, however, a contribution to costs is made but is limited to 5/6 th Factor A. (Practice Direction CA 05/02 copy attached). Factor A being the Court's scale as to the direct pecuniary cost to a lawyer or breakeven point in doing a piece of work and without any "profit" uplift or Factor B component added. A legally aided client remains responsible for the costs of an assigned lawyer, although the reality is that the lawyer will only recover such costs from an alternative source." 20. The extent of costs payable in favour of a legally aided person under the 1961 Law has been the subject of judicial consideration in the Royal Court. The earlier practice had been that the costs were restricted to what the legally aided person would expect to pay; a defendant with no assets to his name and no income would recover nothing. More recently the practice has been that the legally aided person should recover the appropriate amount of costs regardless of his means. 21. The earlier practice began with the decision in *A-G v Bouchard* where Crill, D-B said ([1989] JLR at 353):- "I therefore make an order that the accused shall have his costs - and when I say his costs, I mean that contribution towards the legal aid assistance which he has been granted which he would normally expect to make." The legal arguments were explained in *A-G v Michel*

[2007] JLR 553, by Nice, Commissioner, who commented, after quoting the above, that:-

"Although the phrase 'which he would normally expect to make' might be thought to be ambiguous, it was, I understand, understood as meaning the costs that somebody has been assessed, or would have been assessed, by the advocate as being liable to make to the advocate, win, lose or draw." 22. The decision in *Bouchard* had been endorsed by Tomes, D-B in *A-G v McKinney* (Royal Court 3rd January 1992, unreported) when he said: "I order the payment out of public funds of the costs of the defence, restricted to the contribution towards legal aid which the defendant would normally be expected to pay." 23. In explaining how the decisions evolved, Commissioner Nice cited, and commented upon, the decision of Sir Philip Bailhache in *Santos-Costa v A-G*

[1996] JLR 87 :- "Mr. Whelan's argument was that a legally aided client is not liable for the costs of his defence. If he were liable, he would not be on legal aid. But it seems to me that there is a circularity in this argument. A client obtains legal aid because he is not able to pay for the costs of his defence. But if the court has ordered, following his acquittal, the costs of his defence to be paid out of public funds, he is surely *ex hypothesi* able to pay them. In those circumstances, his lawyer would be entitled to charge him the full fee rather than a reduced fee to reflect his means. In my judgment, the construction of art. 2(4) of the 1961 Law adopted by the court in *Bouchard* amounts to the insertion after the words 'reasonably sufficient to compensate the accused for the expenses properly incurred by him in carrying on the defence' of some such phrase as 'except that where the accused is legally aided, only such contribution as he could afford to pay shall be recoverable'. This seems to me to strain the statutory language beyond its breaking point. I am reinforced in my conclusion by the fact that in enacting the 1961 Law, the legislature was clearly alive to the question of legal aid. In art. 3(3), specific provision is made for the payment of the advocate's fees and expenses on an appeal irrespective of its outcome. Paragraph (1) and

(2) of art. 3 make similar provisions to those found in art. 2(1) for the payment of costs by the appellant or out of public funds." He then set out the article, and states (ibid.): "It was open to the legislature to make specific provision to cover the situation in which an accused person was legally aided if it had wished to do so. In default of any such express provision, it seems to me that the statutory language must be given its ordinary and natural meaning. If, on the accused's acquittal, the court orders the payment of the costs of the defence out of public funds, that is what should be paid." He reached his conclusion with some diffidence, knowing that he differed from two learned judges of this very court. He observed that the conclusion would have the result, which might be thought unfortunate, that there is a premium on success for the lawyer acting for a legally-aided defendant. He continued (ibid., at 95):- "However unfortunate that outcome may be, if it is the result of a proper construction of the statutory language, it must be a matter to be addressed by the legislature. I am comforted, however, by the thought that on this construction, the costs of the defence can at least be objectively determined. On the Bouchard ruling, the costs of the defence are determined by a subjective assessment by the lawyer acting on legal aid of what he thinks his client can reasonably afford to pay." In the upshot, he granted the declaration sought by Mr. Costa, saying (ibid.) that the costs of the defence "should be assessed by the Judicial Greffier without regard to the fact that Mr Hakes was assisted under the legal aid scheme." 24. Commissioner Nice went on to say that he agreed with the then Bailiff's interpretation of the 1961 Law which he applied. We understand that decision has been followed subsequently in both the Royal Court and the Magistrate's Court. In the present application, it is our understanding that in their written submissions, counsel are not seeking to challenge such interpretation. Advocate Hanson has referred to the decision of the Court of Appeal in *Flynn v Reid*

[2012] JCA 169 as authority for the proposition that any benefit to the lawyer by reason of an order for costs in a legally aided case is not relevant to the making of an order. In so doing, it seems to us that he was accepting that if an order for costs is made under the 1961 Law, it will result in a payment to his firm of costs in an amount that will exceed what he can recover under the legal aid certificate. 25. A question to be decided is the scope of the work in respect of which costs are to be awarded. As Advocate Hanson acknowledges, the Appellant was not successful with all the appeal grounds that he pursued and hence it is right that he should not recover the whole of the costs incurred. In our view, the costs should be restricted to the work reasonably involved in connection with the sufficiency of evidence in relation to Count 12, including the work reasonably involved in identifying the various routes to a conviction in order to make the submission that the Appellant ought not to have been convicted on count 12. 26. We appreciate that it may be difficult in taxation to identify how much of the work carried out by Advocate Hanson and his firm was restricted solely to Count 12 but the alternative of simply awarding a proportion of the total costs is unjustifiable when it is difficult for us to assess what proportion of the work was devoted to that Count. We suspect it was substantially less than the one-third that Advocate Hanson has proposed but we cannot say what it should be. (His reason for

suggesting one-third was simply that he succeeded in respect of one of the three counts pursued in the Court of Appeal) Decision 27. For the reasons we have given, we award the Appellant the costs reasonably incurred in connection with the successful appeal against his conviction on Count 12, limited to the work involved in assessing the sufficiency of the evidence adduced in relation to the Count but including work reasonably carried out to assess the various routes to a conviction. Such costs are to be assessed by the Judicial Greffier without regard to the fact that the Appellant was legally aided, that is by allowing the full factor A component and applying the appropriate factor B uplift and without prejudice to the operation of Article 3(3) of the 1961 Law in respect of the other costs of the appeal. Authorities Court of Appeal (Jersey) Law 1961. Dowse and Heys v Attorney General 1997/129. Dowse and Heys v Attorney General

[1997] JLR N 7A. A-G v Bouchard

[1989] JLR 350 . Practice Direction (Costs in Criminal Proceedings) [2011] 1 Cr. App. R. 13. A-G v Michel

[2007] JLR 553 . A-G v McKinney 1992/002. Santos-Costa v A-G

[1996] JLR 87 . Flynn v Reid

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